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No. 07-1182

In the
Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs and Respondents.
and
JENNIFER GRANHOLM, et al.,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR CITIZENS IN CHARGE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Citizens in Charge ("CIC") hereby respectfully moves for leave to file a brief amicus curiae in this case in support of Petitioners, as provided under Rule 37 of the Rules of this Court. The consent of counsel for all parties has been timely requested and, with the single exception of Defendant-Respondents Regents of the University of Michigan, Board of Trustees of Michigan State University, and Board of Governors of Wayne State University, has been obtained. CIC has no parent or publicly-held company owning 10% or more of the corporation's stock.

CIC is a non-profit 501(c)(4) advocacy group that seeks to protect and expand the initiative and referendum rights of citizens, in Michigan and across the country. It believes in maintaining citizen control of government. CIC works with activists, legislators, media, opinion leaders and voters to protect the initiative and referendum process in states where it is enjoyed by the people, and to expand the process to states where voters currently lack these rights. CIC educates the public on the benefits of these rights and also litigates to protect and expand them.

While CIC does not take stands on particular ballot issues, it does assist groups who wish to exercise their direct democracy rights. The initiative right is often the only avenue for citizen-activists to enact laws which limit government. It is crucial to the initiative right that, after having sacrificed their time, resources, and labor to secure popular approval of a measure, sponsors are able to defend the

initiative from court challenges launched by the very foes they had just vanquished at the ballot box. In most, if not all, cases this final effort cannot be left to state government. Indeed, citizens resort to the initiative process precisely because the goals they support are ignored by political elites who control state government. CIC is dedicated to ensuring that the people continue to have access to the initiative right, and thus has a keen interest in the issues posed in this litigation.

Petitioners have focused on the particular facts of their case and this particular initiative. CIC, as a long-time advocate of initiative rights, would like to provide the Court with its perspective. The attached brief contains an overview of initiative and similar rights as they fit in the political process, often as a last resort for ordinary citizens to have their voices heard in a complicated political world of big government and special interests. In particular, many citizens advocate for political change through the initiative process even though the laws they seek to pass will provide them with no direct economic or regulatory benefit. It is this political and ideological interest, not merely the desire for material gain, that motivates many initiative proponents to sacrifice their labor, money, and time with their family to pass new laws.

The brief also includes an extensive discussion of how the courts have traditionally afforded initiative sponsors (and others directly involved in the passage of a law or regulation) the right to intervene in court challenges to the laws they were responsible for getting to the people. Finally, the brief addresses recent developments in Sixth Circuit case law, notably the decision in the case at hand,

which threaten to erode the important rights available to citizens in half the states to make their voices heard through the initiate and referendum process. CIC believes that its proposed brief will assist the Court in analyzing the issues presented in this case, and hopes that the Court will agree to consider its brief in deciding Petitioners' Petition for Certiorari.

CONCLUSION

For the foregoing reasons, CIC respectfully requests that the Court grant it permission to file its attached brief amicus curiae in this case.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of Citizens in Charge is described in its motion for leave to file this brief in support of Petitioners.[1]

SUMMARY OF ARGUMENT

The initiative process reserves the people's right to enact laws directly when their elected representatives refuse to do so. Initiative sponsors devote considerable resources to their causes – sometimes against all economic logic. In most cases, the laws they advocate do not benefit them directly. Sponsors suffer the considerable financial, emotional, and social costs of promoting an initiative simply because they are committed to a political principle. The morning after the votes are counted, such citizen-activists must explain to their long-suffering families that their hard-fought electoral victory is "merely" the victory of a political idea – not some financial or legally protectable interest that will accrue to the family.

In appreciation of this reality, many courts have held that initiative sponsors (and others who have been instrumental in the passage of laws) are entitled to intervene in cases challenging the laws they labored to pass. In circumstances such as this,

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[1] All parties have consented to the filing of this brief, except for the University Defendant-Respondents. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief.

This brief was prepared entirely by amicus curiae, with no contribution of content or funds by any interested party or their counsel.

the Federal Rules of Civil Procedure allow parties to intervene in pending litigation, upon timely motion, if they "claim an interest relating to the property or transaction that is the subject of the action," the disposition of which "may as a practical matter impair or impede the movant's ability to protect its interest," unless "existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

This rule is interpreted liberally to permit intervention by as many truly interested parties as due process and efficiency permits. (Of course, initiative sponsors are a finite group, so allowing their intervention does not encumber a litigation with too many parties – only the ones with the most at stake and the most to offer.) As to the interest required, the courts have stressed that this need not be a specific legal or equitable interest; the very efforts of initiative sponsors evidence their substantial interest in the resulting laws. Thus, prohibiting sponsors from intervening in such lawsuits – while the opponents of the laws are allowed to participate – is an affront to those citizens who have contributed their efforts to the political process. Moreover, it deprives courts of the unique arguments and advocacy of the very parties who cared enough about the measure to fight entrenched governmental and private interests for its passage. Several courts have observed that initiative advocates' expertise weighs in favor of intervention.

Once sponsors' unique interest in initiative litigation is established, the other elements required by Rule 24 flow naturally from the precedents of this Court and the Courts of Appeal, who agree that proposed intervenors face a minimal burden to show possible impairment of their interests and

inadequate representation by existing parties. Indeed, while would-be intervenors need only show that existing parties *may not* adequately represent their interests, in the initiative context there is typically an actual adversity of interests. In sum, the realities of the initiative process demonstrate that initiative sponsors should be entitled to intervene as of right. Their considerable sacrifices to pass initiatives that may not even directly benefit them evidences a political interest which, in a lawsuit challenging the law, may obviously be impaired, and government defendants clearly may not adequately represent the particularized interests of the official proponents of a law which the government itself failed to enact.

As the dissent below recognized, the Sixth Circuit's decision in this case turns traditional Rule 24(a) analysis on its head, requiring that an initiative sponsor be directly regulated by the law it promoted. This test second-guesses the political goals of initiative sponsors by assigning second-class status to those who dedicate their money, time, and efforts to political principles whose implementation will provide them no direct economic or regulatory benefit. For purposes of Rule 24, which seeks to bring together all substantial and unique interests in a litigation, this preference of economic and regulatory political interests over purely principled and ideological political interests is wholly inappropriate. It runs counter to the experience of 400 years of citizen activism on this continent, the intensity and ultimate success of which has not always depended on economic and regulatory grievances.

Allowing the Sixth Circuit's preference for material-based activism over principle-based activism to gain traction would not only discourage citizen initiatives, it would place courts in the dangerous and undemocratic role of deciding which political messages and speakers deserve to be taken seriously in the legal system and, by extension, the public square. This Court must restore order and right-thinking to Rule 24 jurisprudence.

ARGUMENT

I. The Initiative Process Allows Ordinary Citizens To Participate in the Political Process

About half the states reserve some form of initiative or referendum right. Initiative sponsors expend substantial time, energy and money to ensure that their proposal is placed before the people and that it becomes law. They are motivated not by some academic interest in observing a plebiscite, but by the desire to change the law of the land using perhaps the most democratically legitimate form of political action.

Likewise, initiative opponents work throughout the process not to ensure that state procedural and substantive requirements are met, but to ensure the initiative's defeat. As Petitioners point out, the sponsors and opponents of this particular initiative were involved in three separate lawsuits in state and federal court addressing various pre-ballot issues. Participation in such lawsuits is, of course, in addition to the other

expensive and time-consuming work involved in placing a proposed law before the voters, from preparing a petition to having the petition form approved, hiring signature gatherers, circulating the petition for signatures, having the petition and signatures approved, getting the ballot language approved, etc.

After voters approve an initiative, the process continues – the same opponents who fought the law throughout the pre-election phase can now challenge the law itself in the courts, as was done here. For many years, courts likewise permitted initiatives' sponsors to intervene as of right under Rule 24(a) so that they could continue to defend their proposals against challengers' attacks.

Recently, however, the Sixth Circuit fashioned a new test for intervention based on the political cause and motivation of citizen-proponents' activism. Unlike other Circuits, notably the Ninth, the Sixth Circuit no longer considers more objective and relevant intervention factors such as activists' demonstrated willingness to support a measure by acting as sponsors, or the ability of citizen-activists to articulate a unique interest in advocacy before the court. This has resulted in an irreconcilable split among the Circuits.

More importantly, however, it precludes principle-driven initiative sponsors from supporting a cause they have championed from the beginning, while allowing opponents to continue their attacks. The uncertainty created by this circuit split means that citizen-activist-sponsors around the country who are not motivated by any clear economic or regulatory interest will have little incentive to

champion a cause knowing that, even if their hard work pays off, they must forfeit their support of the measure during the "end-game" in the courts.

II. Rule 24(a) Permits Intervention of Right Under Traditionally Liberal Standards

As many federal courts have observed, "Rule 24 is to be construed liberally, and doubts resolved in favor of the proposed intervenor." *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999). *See also California ex rel. Lockyer v. United States*, 450 F.2d 436, 440 (9th Cir. 2006) (same); 59 Am. Jur. 2d *Parties* § 168 (same). Thus, "[e]ven if it could be said that the question raised is a close one, 'close cases should be resolved in favor of recognizing an interest under Rule 24(a).'" *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999) (citation omitted). Such "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (citation omitted).

A party is entitled to intervene under Rule 24(a) if the following test is met :

> (1) the applicant's motion must be timely; (2) the applicant must assert an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that without intervention the

> disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the other parties.

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (citation omitted). *See also Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (same). This test comes from the text of the rule itself. *See* Rule 24(a). These elements are often interrelated. 7C Fed. Prac. & Proc. Civ.3d § 1908 (2008) ("[I]t is important to note that [Rule 24(a)'s requirements] often are very interrelated and the ultimate conclusion reached as to whether intervention is of right may reflect that relationship.").

The burden of establishing the third and fourth elements is minimal. As to the third: "To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is *possible* if intervention is denied. ... This burden is minimal." *Miller*, 103 F.3d at 1247 (emphasis added). Similarly, the fourth factor – inadequate representation by an existing party – is easily shown. As this Court has stated, an applicant need only show that "representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).[2]

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[2] In fact, a 1966 amendment to the rule indicates that burden is now on the *opponent* of intervention to establish adequate representation. *See* 7C Fed. Prac. & Proc. Civ.3d § 1909 (2008)

III. Initiative Sponsors Have Historically Been Entitled to Intervention of Right

Under Rule 24(a) jurisprudence, a timely motion to intervene will be granted as long as the movant has a sufficient interest related to the subject of the litigation, and satisfies the minimal burdens of showing impairment and inadequate representation. Given the liberal construction accorded the rule, and sponsors' obvious interest in supporting their new law, courts have traditionally permitted sponsors to intervene of right in cases involving the subject of the initiative.

In the seminal case of *Washington State Building & Construction Trades Council, AFL-CIO v. Spellman*, the Ninth Circuit noted that Rule 24 "traditionally has received a liberal construction in favor of applicants for intervention." 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). Thus, it was clear to the court that the movant, "as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a)." 684 F.2d at 630. The Ninth

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("[I]t seems entirely clear that the effect of this change is to shift the burden of persuasion. Before the amendment the intervenor had to satisfy the court that representation was or might be inadequate. Although some courts seem to continue to follow this approach, ... the language of the rule clearly suggests that now the intervenor is to be allowed in, if the other conditions of the rule are satisfied, unless the court is persuaded that the representation is in fact adequate.").

Circuit apparently recognized the issue to be so clear as to warrant little discussion.

A. Initiative Sponsors Plainly Have a Sufficient Interest, Which May Be Impaired, to Justify Intervention of Right

Over the years, the Ninth Circuit (and other courts) have allowed intervention where the movant was directly involved in the enactment of the law being challenged. The courts have had little difficulty in finding that such parties satisfied the second and third elements required for intervention. For example, in *Sagebrush Rebellion*, the Ninth Circuit held that it was error to deny intervention to the National Audubon Society in a suit challenging the government's creation of a bird of prey conservation area. The Society was a non-profit organization "devoted to the protection of birds and other animals and their habitats," and had actively participated in the administrative process culminating in the establishment of the conservation area. 718 F.2d at 526-27.[3] The court concluded that "there can be no serious dispute in this case

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[3] Like *Sagebrush Rebellion*, several cases of note do not necessarily involve initiatives. Many cases have involved administrative proceedings. *See, e.g., Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001) ("[W]e find persuasive those opinions holding that organizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens those goals."). In cases involving initiative sponsors, the case for intervention is even stronger as they are in a very real and direct way responsible for the law being challenged.

concerning either the timeliness of the motion to intervene or of the existence of a protectable interest on the part of the applicant which may, as a practical matter, be impaired. An adverse decision in this suit would impair the society's interest in the preservation of birds and their habitats." *Id.* at 528 (citing *Spellman*).

Other courts have easily concluded that the official sponsors of an initiative (and others in analogous situations) have sufficient interest to intervene. Conservation groups dedicated to the preservation of wildlife have been held to have a sufficient interest:

> A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported. ... ICL/CIHD have been active in the process [the Fish and Wildlife Service ("FWS")] went through to list the Springs Snail as an endangered species. The groups even filed a suit to compel FWS to make a final decision on the proposed listing rule. ICL/CIHD satisfy the interest requirement.
>
> Looking to the third requirement, we conclude that disposition in the present action would impair ICL/CIHD's ability to protect their interest in the Springs Snail and its habitat. The action could, and did, lead to a decision to remove the Springs Snail from the list of endangered species.

Idaho Farm Bureau Federation v. Babbitt, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (footnote and citations omitted). *See also Coalition of Arizona, etc. v. Department of Interior*, 100 F.3d 837, 841 (10th Cir. 1996) ("In sum, we hold that Dr. Silver's involvement with the Owl in the wild and his persistent record of advocacy for its protection amounts to a direct and substantial interest in the listing of the Owl for the purpose of intervention as of right, even though Dr. Silver has little economic interest in the Owl itself. Additionally, Dr. Silver's interest in the Owl is legally protectable as evidenced by his successful effort to have the Owl protected as an endangered species under the Act.").

The interest in these cases arose from the fact that the proposed intervenor was the sponsor or supporter of the initiative (or other push for government action). The intensity – not the economic/regulatory nature – of proponents' interests was the critical factor: the cases have involved environmental protection, term limits, the use of English only in government, and other causes. *See, e.g., Prete v. Bradbury*, 438 F.3d 949, 955 (9th Cir. 2006) ("Here, Nesbitt was chief petitioner for the measure, and the Oregon AFL-CIO was a main supporter of the measure. Under the rule from *Sagebrush Rebellion*, intervenor-defendants thus have a 'significant protectable interest' related to this action, and an adverse judgment might impede or impair that interest."); *Bates v. Jones*, 127 F.3d 870, 874 (9th Cir. 1997) ("Unlike the other intervenors on the state's side, [movant] was not an official sponsor of the [term limits] initiative, and we see no reason to grant it intervenor status."); *Sportsmen for I-143 v. Montana Fifteenth Judicial District Court*, 308 Mont. 189, 194, 40 P.3d 400, 403 (2002) ("In this

case, the Sportsmen's Groups were the authors, sponsors, active supporters and defenders of [the initiative]. Accordingly, we conclude that the Sportsmen's Groups have a direct, substantial, legally protectable interest in the instant action challenging the interpretation of I-143, and, as such, they are entitled to intervene as a matter of right."); [4] *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 913 (Alaska 2000) ("If the initiative were declared unconstitutional, its enactment would obviously be vitiated and the efforts of [the] initiative committee members[] to enact a law requiring the use of English in government would be frustrated."). Unlike the Sixth Circuit, none of these courts second-guessed the rationality of or economic-material basis for the intervenors' support of the initiatives at issue; instead, they used an objective measure, like sponsorship of the measure, to determine the intensity of the intervenors' interest.

B. The Interests of Initiative Sponsors Clearly Are Not Adequately Represented by Government Parties

The courts have followed Supreme Court precedent that the movant's burden to show inadequate representation is "minimal," requiring only that they show such representation "may be" inadequate. *Sagebrush Rebellion*, 713 F.2d at 528 (citing *Trbovich*, 404 U.S. at 538 n.10). (Thus, it was not necessary to show any collusion or other conduct unfavorable to the intervenor's interests; indeed, in

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[4] As many states' rules follow the Federal Rules, their courts look to federal precedent.

Sagebrush Rebellion, the government had "continued professionally and diligently to defend" the actions. *Id.*) The court in *Sagebrush Rebellion* considered several factors in holding that this element was satisfied, including "whether the Secretary will undoubtedly make all of the intervenor's arguments, whether the Secretary is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." *Id.* The court also cited the fact that "[i]n addition to having expertise apart from that of the Secretary, the intervenor offers a perspective which differs materially from that of the present parties to this litigation." *Id.* Thus, even where the government's position was not adverse to the intervenors', the courts ..have permitted intervention. *See also Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001) (interests of environmental organizations were not adequately represented by government in action to invalidate proclamation establishing national monument; even if government had vigorously represented interests of intervenors in defending creation of monument, it was not realistic to assume that government's programs would remain unaffected by unanticipated policy shifts); *Sportsmen for I-143*, 308 Mont. at 194-95, 40 P.3d at 403 (sponsors entitled to intervene where, *inter alia*, government defendant was "a political appointee and considering the ongoing political controversy surrounding the game farm issue"); *Kritz*, 3 P.3d at 914 ("Indeed, we believe that a sponsor's direct interest in legislation enacted through the initiative process and the concomitant need to avoid the appearance of adversity will ordinarily preclude courts from denying intervention as of right to a sponsoring group.").

In this case, and many others involving intervenors, it is beyond dispute that the government's defense of the law at issue is in fact inadequate. Often, the state defendants are openly hostile to the very law they purport to defend. *See, e.g., Babbitt*, 58 F.3d at 1398 ("FWS delayed its decision on the [endangered species] listing proposal for years and took action only after ICL/CIHD filed suit to compel FWS to make a decision. ... FWS was unlikely to argue on behalf of ICL/CIHD, the very organizations that compelled FWS to make a final decision by filing a lawsuit. FWS would not have adequately represented ICL/CIHD's interests."); *Kritz*, 3 P.3d at 913-14 (noting that the "Attorney General's Office questioned the constitutionality of the initiative" and "the governor personally opposed the measure publicly and unequivocally by stating that it was '"unnecessary, unfair and unfortunate"').

C. Initiative Sponsors Should Enjoy a Per Se Right to Intervene Under Rule 24(a)

Given the unique posture of initiative sponsors, in comparison with other prospective intervenors, they should enjoy an automatic right to intervene under Rule 24(a). Indeed, some courts have declared that there is a "per se" rule permitting initiative sponsors to intervene, acknowledging that a sponsor's right to intervene obviously flows from its particular interest in the measure it brought to the people for a vote. As the Ninth Circuit has stated, "there is a virtual *per se* rule that the sponsors of a ballot initiative have a sufficient interest in the subject matter of litigation concerning that initiative to intervene pursuant to [Rule] 24(a)." *Yniguez v.*

State of Arizona, 939 F.2d 727, 733 (9th Cir. 1991).[5] *See also Bates v. Jones*, 904 F. Supp. 1080, 1086 (N.D. Cal. 1995) ("The individualized interest of official proponents of ballot initiatives in defending the validity of the enactment they sponsored is sufficient to support intervention as of right.").

Indeed, the *Bates* court distinguished between the interests of official sponsors and mere "supporters" of the measure. *Id.* at 1086-87 ("These individualized interests are distinguishable from the general interest of supporters of term limits, however."). It explained that the interest of the official sponsors of the measure "in its continued validity could obviously be impaired in this litigation" and they would therefore be allowed to intervene if their interest was not adequately represented by other parties. The court added that "an official sponsor of a ballot initiative may be considered to add an element not covered by the government in defending the validity of the initiative in that the very act of resorting to a ballot initiative indicates a rift between the initiative's proponents and voters and their elected officials on the issue that underlies the initiative." *Id.* at 1087. A per se rule allowing intervention of right recognizes the important interest sponsors have as the result of

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[5] *Yniguez* involved a motion to intervene made *after* the district court declared the challenged law (declaring English to be the official state language) unconstitutional. The only defendant in the case, the Governor, who had publicly opposed the measure, announced she would not appeal the district court's order. *Id.* at 730. The sponsor sought to intervene in order to pursue the appeal itself, which the appellate court held would require the sponsor to satisfy Article III standing in addition to satisfying Rule 24(a). *Id.* at 731. That issue is not presented here.

their dedication to the issue, and provides the court the benefit of the sponsors' expertise and commitment.

IV. The Sixth Circuit Departs from Established Precedent, Holding that Initiative Sponsors Lack Sufficient Interest to Intervene in Support of Legislation Enacted Through their Efforts

A. Sixth Circuit Precedent on Intervention of Right

In 1997, the Sixth Circuit held that the Michigan Chamber of Commerce was entitled to intervene in a case challenging campaign finance legislation. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). Although this case did not involve an initiative, the court noted the Chamber had been active in the process leading to the legislation, analogizing the facts before it to those in the Ninth Circuit's *Babbitt* decision. *Id.* at 1246. Noting that the Circuit followed "a rather expansive notion of the interest sufficient to invoke intervention as of right," requiring less of a showing than the Article III standing required to commence a lawsuit, the court "'reject[ed] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Id.* at 1245. Observing that the inquiry was "necessarily fact-specific," *id.*, the court concluded that several facts supported intervention:

> The evidence shows that the Chamber was (1) a vital participant in

> the political process that resulted in legislative adoption of the 1994 amendments in the first place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs.

Id. at 1246-47. *Cf. Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 316 (6th Cir. 2005) ("In short, there is a serious question as to whether Hillandale Committee is, in fact, the duly authorized committee which circulated the referendum petitions.' If it is not, it has no basis from which to claim a substantial legal interest in protecting the results of the referendum.").

The court in *Miller* went on to find that the minimal showings required for the impairment and inadequate representation elements were met. 103 F.3d at 1247-48. Significantly, the court pointed out that the Secretary of State had opted not to appeal a preliminary injunction entered in the case. The court explained:

> While passively tolerating a preliminary injunction pending a final resolution of the merits may serve the interests of the State of Michigan, it cannot be said to represent the Chamber's interests, in view of its concern with timeliness. The decision not to appeal certain aspects of

> the district court's preliminary injunction may amount to sound litigation strategy and a prudent allocation of Michigan taxpayers' money, but this decision also further illustrates how the interests of the state and of the Chamber diverge.

Id. at 1248. It is important to note that in the present case, not only did the government defendant "passively tolerat[e]" a preliminary injunction, it affirmatively agreed to it.

In 1999, the court followed *Miller* to permit intervention in a case challenging a university's race-based admissions policy. *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999). The district court below had denied intervention to students and applicants for admission to the university as well as three "pro-affirmative action coalitions" and a non-profit organization "whose stated mission is to preserve opportunities for African-American and Latino/a students in Michigan." *Id.* at 397. On appeal, the Sixth Circuit held that the proposed intervenors all had sufficient interest, noting that this was an "expansive notion" that did not require a "specific legal or equitable interest." *Id.* at 398 (citations omitted). Noting that close cases should be resolved in favor of intervention, the court held that the proposed intervenors had stated a sufficient interest, "namely their interest in gaining admission to the University[.]" *Id.* at 399. (In concluding, the court did not specifically address the coalitions' or non-profit group's interests, but did hold that all proposed

intervenors could intervene.[6]) After finding that the intervenors also met the minimal burden of showing a possible impairment of their interest, the court criticized the district court's analysis of the inadequate representation issue, stressing that "the proposed intervenors were required only to show that the representation *might* be inadequate." *Id.* at 399-400 (emphasis in original).[7]

B. The Sixth Circuit Denies Initiative Sponsors the Right to Intervene Merely Because They Are Not Directly Regulated by the Resulting Law

The Sixth Circuit subsequently departed from the reasoning of the foregoing precedent, announcing a new test that creates two classes of political advocates: those who act out of economic and regulatory considerations, and those who act based on political principle.

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[6] The district court below noted that the non-profit group consisted of "'individuals, some of whom are parents or grandparents of prospective African-American and Latino students in the State of Michigan.'" *Gratz v. Bollinger*, 183 F.R.D. 209, 212 n.4 (E.D. Mich. 1989). The district court therefore concluded that "it would appear that the proposed student intervenors and the association share the same 'interest' in the preservation of race as a factor in determining admissions." *Id.*

[7] The court observed that "this circuit has declined to endorse a higher standard for inadequacy when a government entity is involved." *Id.* As the case law makes clear, such a higher standard is especially contraindicated where, as in this case, the government is defending an initiative measure.

As noted above, the *Miller* court remarked that, as one of four facts supporting a finding of interest, the intervenor was itself regulated by some of the provisions being challenged. 103 F.3d at 1247. In *Northland Family Planning Clinic, Inc. v. Cox*, the court inexplicably exaggerated the significance of this single factor. 487 F.3d 323 (6th Cir. 2007), *cert. denied.*, -- U.S. ---, 128 S. Ct. 872, 873 (2008). The court therefore denied intervention to STTOP, the committee formed to promote passage of the law being challenged. The court distinguished *Miller*, stating:

> Here, STTOP might share two of these four factors with the Chamber of Commerce, but clearly does not share the other two. Although STTOP was involved in the process that resulted in the passage of the challenged legislation, and might be adverse to the plaintiffs in the state's regulation of abortion practices, it is not a repeat player in litigation, as it was created for only one specific ballot initiative, and is not itself regulated by any of the statutory provisions at issue here. This fourth factor is particularly significant – unlike the Chamber of Commerce in *Miller*, STTOP has only an ideological interest in the litigation, and the lawsuit does not involve the regulation of STTOP's conduct in any respect. Thus, STOPP's case for intervention here is much weaker than that of the Chamber of Commerce in *Miller*.

487 F.3d at 344-45. The court's disproportionate focus on this one factor is not supported in prior precedent.[8] Nor does it make sense from a logical standpoint. The court stated that the group was "not a repeat player in litigation, as it was created for only one specific ballot initiative." However, the fact that the group was actually created to, and did, sponsor an initiative on the issue, with all the efforts that entails, indicates that the group's interest was more than merely ideological. This is precisely the type of effort which has led the Ninth Circuit and other courts to recognize the right of initiative sponsors to intervene in cases challenging the resulting legislation.

In the present case, the Sixth Circuit unaccountably elevated the *Miller* court's reference to a single relevant fact – direct regulation by the resulting law – to a prerequisite for intervention. *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007). Petitioners argued to

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[8] The court attempted to draw what it called a "useful distinction" between cases challenging the procedure required to pass a law (in which intervention would be appropriate) and those challenging the government's subsequent enforcement of the rule or law after its enactment. *Id.* at 345. However, most examples cited by the court were in fact post-enactment challenges. The courts have not drawn distinctions based on the type of challenge to laws enacted through the initiative process; they have simply held that in the face of such a challenge, on whatever grounds, the sponsor or supporter may intervene. *See, e.g., Spellman*, 684 F.2d at 629-30 (in action challenging constitutionality of statute, sponsor entitled to intervene as matter of right); *Babbitt*, 58 F.3d at 1397 (groups entitled to intervene in action challenging rule on basis rule was arbitrary and capricious because defendant committed procedural errors).

the Sixth Circuit that "as groups substantially involved in the process leading to the adoption of the challenged amendment, they have a legal interest in the subject matter of this lawsuit," relying on the court's prior decisions in *Grutter* and *Miller*, as well as Ninth Circuit law that the court had cited in the past. *Id.* at 780. Nonetheless, the court held that under *Northland Family Planning*, which it found dispositive, "an organization involved in the process leading to the adoption of a challenged law[] does not have a substantial legal interest in the subject matter of a lawsuit challenging the legality of that already-enacted law, *unless the challenged law regulates the organization or its members.*" *Id.* at 781 (emphasis added). Although this conclusory statement mischaracterizes the court's prior opinion, in which it referred to this factor as "particularly significant," 487 F.3d at 345, rather than a strict precondition for intervention, it confirms that the Sixth Circuit has fashioned a new test at odds with that of the Ninth.

Indeed, the dissent below criticized the court's reliance on *Northland Family Planning* because that opinion "fundamentally altered the Rule 24(a) landscape" and ignored the basis for the prior holdings of the Sixth and Ninth Circuits. 501 F.3d at 785 (Kennedy, J., concurring and dissenting in part); *see also id.* at 785 n.1 (adding that the holding may well be dicta). Prior case law simply did not require that a proposed intervenor be subject to the law it sponsored in order to support intervention. As the dissent below noted, in the *Spellman* case "[t]he public interest group was not regulated by the initiative, which the majority concludes is critical here[.]" *Id.*

The dissent also stressed a reality which the majority below ignored:

> When the government has passed a law, it can be trusted to administer it. When, as here, however, government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

Id. at 786 (emphasis in original). The dissent further observed that, as in many cases where the people are forced to resort to the initiative, there was an objective basis for the intervenors' fear that the government could not be relied upon to defend the law. *See id.* at 786 ("[T]he Attorney General and the Governor have already compromised with the plaintiffs and the cross-claimants in this case and stipulated to an injunction that, we have previously found, had no basis in federal law. In addition, [before the election] the Governor opposed [the amendment].").

The dissent correctly concluded:

> All of this reinforces concern with entrusting the "public interest in enforceability" of a general election, voter-approved measure to elected officials. As the example of the Governor proves, there are cases in which the elected officials of a state will disagree with the majority of the voting population on a particular point of

> public policy. Therefore, when the voters demonstrate their preference on that point of public policy through the constitutional amendment process, it follows that some representative of the voters has a "substantial interest" in defending that position: I agree with the Ninth Circuit's conclusion in *Spellman* that the sponsor of the measure should be that representative.

Id. at 786-87.

As the dissent recognized, the majority decision turns traditional Rule 24(a) analysis on its head, requiring an initiative sponsor to actually be directly regulated by the law it promoted. But as discussed above, the majority's new rule is grounded in a political philosophy that prefers some types of political advocacy over others: "legitimate" advocacy that is based on some material or economic interest is preferred and its proponents are welcomed in the federal courts, while advocacy that is based on principle, without any specific economic or regulatory interest, is devalued. Federal courts effectively "second-guess" the motivations of principle-based advocates.

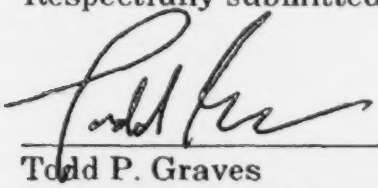
Such a preference is without any basis under Rule 24(a), since both types of advocates would have already proved the depth of their interests and their abilities to marshal unique arguments in the courts through months or years of prior political and legal efforts at the state level. Thus, the Sixth Circuit's new test is itself a political judgment about the value of different types of advocacy in this country. It is a judgment which courts should not be allowed to

make, since (as discussed in Petitioners' brief) it inevitably chills political speech and association. This Court should consider the serious issues raised by the circuit split induced by the Sixth Circuit's new test, and should ultimately reject that test as inconsistent with the text and spirit of Rule 24.

CONCLUSION

For the foregoing reasons, amicus curiae respectfully requests that the Court grant Petitioners' writ of certiorari.

Respectfully submitted,



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